

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 5 July 2013**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 28 June 2013**

Date of tabling in LegCo : 3 July 2013

Amendment to be made by : 16 October 2013 (or 6 November 2013 if extended by resolution)

Arbitration Ordinance (Cap. 609)

Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (L.N. 115)

The Arbitration Ordinance (Cap. 609) (the Ordinance), which was enacted in November 2010, repeals the previous Arbitration Ordinance (Cap. 341) and reforms the law relating to arbitration by unifying the existing domestic and international regimes of arbitration under Cap. 341. The Ordinance came into operation on 1 June 2011. By virtue of section 110 of the Ordinance¹, the Arbitration (Appointment of Arbitrators and Umpires) Rules originally made under Cap. 341 (now Cap. 609 sub. leg. B with necessary modifications) (the existing Rules) continue to be in force and have the like effect for all purposes as if made under the Ordinance. The existing Rules provide for the establishment of an Appointment Advisory Board, and prescribe the procedures for applying to the Hong Kong International Arbitration Centre (the HKIAC) for the appointment of an arbitrator or umpire and a decision as to the number of arbitrators under an arbitration agreement.

2. L.N. 115 is made by the HKIAC under section 13(3) of the Ordinance with the approval of the Chief Justice. It repeals the existing Rules and substitutes them with a new set of Rules to make provisions to facilitate the HKIAC's performance of the following functions:

¹ Under section 110 of the Ordinance, any subsidiary legislation made under Cap. 341 and in force at the commencement of the Ordinance, so far as it is not inconsistent with the Ordinance, continues in force and has the like effect for all purposes as if made under the Ordinance.

- (a) the default appointment by the HKIAC of an arbitrator under section 24 of the Ordinance²;
- (b) the decision by the HKIAC on whether there is to be 1 or 3 arbitrators under section 23(3) of the Ordinance³; and
- (c) the default appointment by the HKIAC of a mediator under section 32(1) of the Ordinance⁴.

3. The provisions in L.N. 115 are substantially the same as those in the existing Rules except as noted below.

Appointment of Arbitrator

4. The procedure for applying to the HKIAC for the appointment of an arbitrator provided in Part 3 of L.N. 115 is substantially the same as that under Part III of the existing Rules, except that:

- (a) the parties' nationality is now specified explicitly under the new rule 7(1)(c) as a relevant factor to be taken into account by the HKIAC in appointing a suitable person to be an arbitrator;
- (b) it is now specified in the new rule 7(2) that any information given by the other party or parties to the HKIAC in response to a request for the appointment of an arbitrator must be in written form; and
- (c) the parties and their solicitors/advisers may now also provide their email addresses in the new Form 1.

Number of Arbitrators

5. The new procedure for seeking a decision by the HKIAC on the number of arbitrators under Part 4 of L.N. 115 is substantially the same as that under Part IV of the existing Rules, except that:

² Section 24 provides, among other things, that if a party fails to appoint an arbitrator, HKIAC must make the necessary appointment upon a request to do so from any party.

³ Section 23(3) provides that if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by HKIAC in the particular case.

⁴ Section 32(1) stipulates that if an arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties and that person refuses or fails to make the appointment, HKIAC may, on the application of any party, appoint a mediator.

- (a) the new rule 9(7) now specifically requires the HKIAC to notify the parties when it has made a decision; and
- (b) the parties and their solicitors/advisers may also provide their email addresses in the new Form 2.

Appointment of Mediator

6. L.N. 115 includes a new Part 5 to prescribe the procedure and the form (Form 3 in the Schedule) for applying to the HKIAC for the appointment of a mediator under section 32(1) of the Ordinance. The procedure for applying to the HKIAC for the appointment of a mediator, including the factors to be taken into account by the HKIAC in making such appointment, is similar to that for requesting the HKIAC to appoint an arbitrator under Part 3.

Fees

7. Under the existing Rules, the fee for applying to the HKIAC for the appointment of an arbitrator or a decision on the number of arbitrators is \$4,000. Rule 13(1) of L.N. 115 provides that the HKIAC may charge \$8,000⁵ for making any appointment or decision referred to in paragraph 2 above. According to the LegCo Brief (File Ref.: LP 19/00/4C) issued by the HKIAC on 21 June 2013, the new fee is based on the estimated costs of sample cases handled by the HKIAC from January to May 2012. However, under rule 13(2), the HKIAC may charge a reasonable fee that exceeds \$8,000 but does not exceed \$15,000 for the recovery of expenditure incurred or likely to be incurred by it in making the above appointment or decision. The Legal Service Division (LSD) is seeking the HKIAC's clarifications as to the relationship between rules 13(1) and 13(2), and the circumstances in which its fee would exceed \$8,000.

8. L.N. 115 will come into operation on 2 December 2013.

9. It is unclear from the LegCo Brief whether the HKIAC has consulted members of the public or relevant stakeholders on L.N. 115. LSD has written to the HKIAC to seek its clarification in that regard.

⁵ Section 29(1A) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that where an Ordinance confers a power on a person to make subsidiary legislation, the subsidiary legislation may impose a fee or charge for anything in it or the Ordinance.

10. As advised by the Clerk to the Panel on Administration of Justice and Legal Services (the Panel), the Panel received a letter dated 12 October 2012 (LC Paper No. CB (4)40/12-13(03)) from the HKIAC inviting the Panel's views on the draft Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (draft Rules). At the Panel meeting on 27 November 2012, members agreed that there was no need to invite the HKIAC to brief members on the draft Rules, and that should members have any views on the draft Rules, they could convey such views to the Clerk for onward transmission to the HKIAC. No comments had been received by the Clerk. On 14 January 2013, the Assistant Secretary-General of the HKIAC advised the Clerk that given no member had expressed any view or requested further information on the draft Rules, the HKIAC had in January 2013 submitted the draft Rules to the Chief Justice for approval.

11. Apart from the matters referred to in paragraphs 7 and 9 above, LSD is also asking the HKIAC to clarify certain drafting issues relating to L.N. 115. If necessary, a further report will be issued after considering the HKIAC's reply.

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